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Commentary on Article 37 of the EU Charter of Fundamental Rights – Environmental Protection

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Abstract

This paper analyses Article 37 (Environmental Protection) of the EU Charter of Fundamental Rights from the viewpoints of EU law and international environmental law. It explores the reasons for the lack of any individually justiciable environmental right of a substantive or procedural character under the Charter. The paper then investigates the potential of Article 37 to influence the interpretation and application of EU law and of other Charter provisions in the light of the EU treaty requirement of environmental integration.

Keywords

EU Charter, environmental integration, environmental rights, access to justice, international environmental law

Commentary on Article 37 of the EU Charter of Fundamental Rights – Environmental Protection

*Gracia Marín Durán and Elisa Morgera**

Article 37, which is found under Title IV ‘Solidarity’ of the Charter, reads:

Environmental Protection

A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and assured in accordance with the principle of sustainable development.

Explanation on Article 37 – Environmental Protection

The principles set out in this Article have been based on Articles 2, 6 and 174 of the EC Treaty, which have now been replaced by Article 3(3) of the Treaty on European Union and Articles 11 and 191 of the Treaty on the Functioning of the European Union. It also draws on the provisions of some national constitutions.¹

A. Field of Application of Article 37

Article 37 belongs to the category of ‘principles’ in the Charter, and lays down the duties of public authorities in relation to environmental integration in policy-making and implementation. It does not, however, sanction any individually justiciable right to environmental protection, or to an environment of any particular quality. As will be seen, this contrasts with the approach taken in many of the national constitutions of the Member States,² which do not only place a responsibility on governmental authorities to protect the environment, but also recognize an autonomous ‘right to environment’.³ In omitting any reference to environmental rights, Article 37 fails to take a stance on the ‘still controversial notion of a [substantive] right to a decent environment’ under international environmental law.⁴ Moreover, it falls short of incorporating in the Charter environmental rights of a procedural character (i.e. access to environmental information, participation in the decision-making concerning the environment, and access to justice in environmental matters), which are generally recognised under international environmental law.⁵ This lacuna is

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¹ Explanations relating to the Charter of Fundamental Rights [2007] OJ C 303/17 (Explanatory Notes), at 27.

² E.g. Spanish Constitution (version 2011) Article 45; see further section C. II below.

³ A. Boyle, ‘Human Rights or Environmental Rights: A Reassessment?’ (2007) 18 *Fordham Environmental Law Review* 471, at 478-482.

⁴ A. Boyle, ‘Human Rights and the Environment: Where Next?’ (2012) 23(3) *European Journal of International Law* 613, at 616.

⁵ Rio Declaration on Environment and Development (12 August 1992) UN Doc A/CONF.151/26 vol.1 Annex I (Rio Declaration), Principle 10.

even more striking given that the realization of these procedural guarantees is already an international obligation binding on the Union and its Member States under the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.⁶ Short of asserting any right related to the environment, we will explore whether Article 37 may nevertheless influence the interpretation and application of EU law and of Charter provisions guaranteeing individual rights.

In light of its cross-cutting, mainstreaming, nature, the field of application of the principle of environmental integration enshrined in Article 37 is not, a priori, limited to measures adopted in the field of environmental policy,⁷ or any other particular area of EU law. Quite to the contrary, the requirement to integrate a ‘high level of environmental protection’ and ‘the improvement of the quality of the environment’ extends, in principle, to *all* Union policies, both internal and external ones. The reference to ‘policies of the Union’ seems to indicate that Article 37 applies to, and binds primarily, the Union institutions,⁸ and in particular the Commission, the Council and the European Parliament for their legislative functions. Yet, Article 52(5) of the Charter clarifies that the provisions containing principles, such as Article 37, ‘may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers.’ Therefore, not only EU institutions and other bodies are required to ‘observe’ the principle of environmental integration, but also the Member States themselves whenever they are implementing EU law. The latter expression may be understood as applying to Member States’ measures falling ‘within the scope of’ EU law, thereby including measures taken by Member States not only with a view to implementing, but arguably also derogating from, Union rules.⁹

It is quite difficult to detail specific instruments of EU law falling within the field of application of Article 37,¹⁰ for two reasons. First, in light of the prolific environmental law-making activity of the EU, it has been argued that “there is European legislation in almost every conceivable field of environmental policy,”¹¹ and indeed EU environmental law covers issues ranging from climate change, to biodiversity, water, air pollution, noise, dangerous substances,

⁶ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 25 June 1998, 2161 UNTS 447 (Aarhus Convention), to which the EU and almost all of its Member States are parties: see further section D below.

⁷ That is, acts adopted pursuant to Articles 191(4) and 192 TFEU (below n 72).

⁸ Explanatory Note, at 32: “the Charter applies primarily to the institutions and bodies of the Union, in compliance with the principle of subsidiarity.”

⁹ D. Anderson and C. Murphy, ‘The Charter of Fundamental Rights: History and Prospects in Post-Lisbon Europe’ EUI Working Papers LAW 2011/08, at 8, on the basis of Case C-260/89 *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others* (ERT) [1991] ECR I-2925, para 43.

¹⁰ A list of EU legislation ‘related’ to Article 37 is nonetheless offered by the European Union Agency for Fundamental Rights at: http://infoportal.fra.europa.eu/InfoPortal/infobaseShowContent.do?btnCat_413&btnCountryBroad_169.

¹¹ J. Jans and H. Vedder, *European Environmental Law* (3rd ed, Europa Law Publishing, 2012) at 253.

genetically modified organisms, waste, nuclear safety, as well as horizontal measures on environmental assessments, integrated pollution prevention and control, integrated product policy and environmental liability.¹² This means that about 70-80% of environmental law implemented in the Member States is of EU origin.¹³ Second, several pieces of EU legislation other than environmental legislation may be considered as falling within the scope of application of Article 37, as they have implemented, to different degrees, the principle of environmental integration, with the most prominent examples found in the areas of the Common Agricultural Policy, the Common Fisheries Policy, transport, energy, and external policies.¹⁴ Accordingly, the scope of application of Article 37 is wide-ranging, if not almost all-encompassing, both at EU and Member State level, although, as will be shown, the enforceability of the principle faces significant limitations.

B. Interrelationship of Article 37 with other provisions of the Charter

While the Charter does not explicitly establish a direct link between Article 37 and other provisions, some of the Charter rights ‘shall’, and others may, be interpreted as including environmental rights. Within the first group, Charter rights which correspond to the rights protected under the European Convention on Human Rights (ECHR) must be given the ‘same meaning and scope’ by virtue of Article 52(3) of the Charter. Among these, the following rights¹⁵ have been interpreted by the European Court of Human Rights (ECtHR) as providing indirect protection with regard to environmental matters:¹⁶

- Article 2 of the Charter on the right to life corresponds to Article 2 ECHR, which has been interpreted as placing a positive obligation on States to protect individuals’ life from dangerous activities, such as nuclear tests, the operation of chemical factories with toxic emissions or waste-collection sites, whether carried out by public authorities themselves or by private companies;¹⁷
- Article 7 of the Charter on the right to respect for private and family life corresponds to Article 8 ECHR, which has been interpreted as giving rise to a positive duty for States, under certain circumstances, to protect

¹² Ibid., Ch 8 for a relatively succinct but incisive overview.

¹³ L. Kramer, ‘Regional Economic International Organizations: The European Union as an Example’ in D. Bodansky et al. (eds.), *The Oxford Handbook of International Environmental Law* (Oxford University Press, 2007), at 860.

¹⁴ For a succinct overview, see L. Kramer, *EU Environmental Law* (7th ed, Sweet and Maxwell, 2011), Ch 11; and for a more comprehensive examination, see N. Dhondt, *Integration of Environmental Protection into Other EC Policies – Legal Theory and Practice* (Europa Law Publishing, 2003); G. Marín Durán and E. Morgera, *Environmental Integration in the EU’s External Relations – Beyond Multilateral Dimensions* (Hart Publishing, 2012).

¹⁵ Explanatory Notes, at 33-34.

¹⁶ Council of Europe, *Manual on Human Rights and the Environment – Principles derived from the Case law of the European Court of Human Rights* (2nd edition, Council of Europe Publishing, 2012). The literature is extensive: for a discussion connected to the purpose of the present chapter, see N. de Sadeleer, ‘Enforcing EUCHR Principles and Fundamental Rights in Environmental Cases’ (2012) 81 *Nordic Journal of International Law* 81, at 60-73.

¹⁷ See summary of relevant ECtHR case law in Council of Europe, n 16 above, at 35-41.

individuals from environmental factors that directly and seriously affect their private and family life, or their home;¹⁸ and

- Article 17 of the Charter on the right to property corresponds to Article 1 of Protocol No. 1 to the ECHR, which has been interpreted as imposing a positive obligation on States to put in place environmental standards necessary to protect individuals' peaceful enjoyment of their possessions.¹⁹

In addition, Article 11 of the Charter on freedom of information corresponds to Article 10 ECHR,²⁰ which has been interpreted as giving rise to a positive obligation for public authorities to establish effective and accessible procedures that would enable individuals to seek all relevant and appropriate environmental information when their right to life, or/and their right to respect for private and family life, are threatened.²¹ Article 42, however, is the most relevant provision in the Charter in relation to access to environmental information, which is based on EU law²² – namely Article 15(3) TFEU and Regulation 1049/2001 on access to documents.²³ These norms provide a significant level of access to environmental information,²⁴ and have been complemented by more specific rules under the so-called Aarhus Regulation (1367/2006).²⁵

While the environmental dimension of the above-mentioned provisions of the Charter derives from either other sources in EU law, or the case law of the ECtHR, this does not exclude the possibility for other Charter provisions to be “greened” when read in conjunction with Article 37. This may be the case of

¹⁸ See summary of relevant ECtHR case law in Council of Europe, n 16 above, at 44-60. The environmental dimension of Article 8 ECHR has been extensively covered by other commentaries on Article 37 of the Charter, noting in particular the wide margin of appreciation left to public authorities in the *Hatton II* case (*Hatton and Others v UK* (2003) Report 2003-VIII), see e.g., F. Benoît-Rohmer, ‘Article 37 – Protection de l’environnement’ in EU Network of Independent Experts on Fundamental Rights, ‘Commentary on the Charter of Fundamental Rights of the European Union’ (June 2006), at 316, available at: http://ec.europa.eu/justice_home/cfr_cdf/index_en.htm; K. Hectors, ‘The Chartering of Environmental Protection: Exploring the Boundaries of Environmental Protection as a Human Right’ (2008) 17(3) *European Energy and Environmental Law Review* 165, at 169-170; M. Lombardo, ‘The Charter of Fundamental Rights and the Environmental Policy Integration Principle’ in G. Di Federico (ed.), *The EU Charter of Fundamental Rights – From Declaration to Binding Instrument* (Springer, 2011), at 235-238. It should be noted, however, that the ECtHR case law has further evolved on this point, notably in *Taşkin and Others v. Turkey*, 46117/99 [2004] ECHR 621 (10 November 2004). For a discussion, see de Sadeleer, n 16 above, at 64-72.

¹⁹ See summary of relevant ECtHR case law in Council of Europe, n 16 above, at 62-73.

²⁰ Explanatory Notes, at 21.

²¹ See summary of relevant ECtHR case law in Council of Europe, n 16 above, at 76-85.

²² Explanatory Notes, at 28.

²³ Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents [2001] OJ L145/43.

²⁴ M. Lee, *EU Environmental Law* (Hart Publishing, 2005), at 128-9 and 131-2; Kramer, *EU Environmental Law*, n 14 above, at 137.

²⁵ Regulation (EC) No 1367/2006 of the European Parliament and of the Council on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies [2006] OJ L264/13.

the right of EU citizens²⁶ to refer to the Ombudsman cases of maladministration by Union institutions or bodies (Article 43 of the Charter), since the notion of maladministration could, for instance, include departures from guidelines and procedures to implement environmental integration.²⁷ It may well be the case also of the right to petition the European Parliament (Article 44 of the Charter), which could provide an avenue to enquire about the observance of environmental integration principle in the legislative process.

C. Sources of Article 37

As stated in the Explanatory Notes to the Charter, both EU law (Articles 3(3) TEU, 11 and 191 TFEU) and some Member States' constitutions are sources of Article 37 of the Charter. It should thus be emphasized that, as opposed to other Charter provisions, the drafters of the Charter did not draw inspiration from relevant UN treaties, notably the Aarhus Convention in relation to procedural environmental rights (discussed below), or the case law of the ECtHR that has gradually developed an environmental dimension to certain rights protected under the European Convention on Human Rights (discussed above).²⁸

I. EU Law

At first glance, the wording of Article 37 appears to be a combination of Articles 3(3) TEU, which is part of the general provisions setting forth core objectives of the Union,²⁹ and 11 TFEU,³⁰ which proclaims environmental integration as a general principle of EU law. In fact, environmental integration was first introduced in EU primary law by the Single European Act of 1986³¹ as a principle within the title conferring express competence on environmental matters to the then European Economic Community.³² It was only with the Treaty of Amsterdam of 1997³³ that environmental integration was upgraded to a general principle of EU law.³⁴

Article 3(3) TEU provides that the EU 'shall work', inter alia, for a 'high level of protection and 'improvement of the quality of the environment'.³⁵ Both of these terms have been reiterated in Article 37 as the object of the environmental integration principle, but cannot be found in the text of Article 11 TFEU. This

²⁶ Or of any natural or legal person residing or having its registered office in a Member State (Art. 228 TFEU; Article 44 Charter).

²⁷ The argument has been put forward by Marín Durán and Morgera, n 14 above, at 288, and was inspired by A. Alemanno, 'The Better Regulation Initiative at the Judicial Gate: A Trojan Horse within the Commission's Walls or the Way Forward?' (2009) 15(3) *European Law Journal* 382, at 388.

²⁸ See section B above.

²⁹ Former Article 2 EC Treaty.

³⁰ Former Article 6 EC Treaty.

³¹ Single European Act [1987] OJ L169/1 (SEA).

³² Title VII 'Environment' SEA. For an overview of the emergence and evolution of EU competence on environmental matters, see Marín Durán and Morgera, n 14 above, at 9-13.

³³ Treaty of Amsterdam [1997] OJ C340/1 (Treaty of Amsterdam).

³⁴ See Marín Durán and Morgera, n 14 above, at 25-28, for an overview of the emergence and evolution of the environmental integration principle.

³⁵ These terms were added to former Article 2 EC Treaty by the Treaty of Amsterdam.

and other differences can, in fact, be noticed when comparing the language of Article 37 with that of Article 11 TFEU, which provides ‘*environmental protection requirements* must be integrated into the *definition* and *implementation* of the Union’s policies *and activities*, in particular *with a view to promoting* sustainable development’ (emphases added). The inclusion of environmental protection in the Charter thus raises a number of interpretative questions, when examined against the backdrop of the *acquis* of the EU Treaties: Is Article 37, in essence, just a re-affirmation of Article 11 TFEU, or are the textual differences emphasized above of any legal significance?

Finally, the Explanatory Notes also refer to Article 191 TFEU, which is the legal basis for EU environmental policy, as a source of Article 37 of the Charter. Article 191 TFEU is broadly formulated and allows for including all conceivable environmental issues within the remit of EU environmental competence. Its first paragraph sets out four objectives for EU action (both internal and external) in the field of the environment, namely: ‘preserving, protecting and improving the quality of the environment’; ‘protecting human health’; ‘ensuring the prudent and rational utilisation of natural resources’, and ‘promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.’ In addition, Article 191(2) TFEU lays down a number of principles to guide law-making and interpretation, namely: high level of environmental protection; precaution; prevention; rectification at source; and the polluter pays.³⁶ Against this background, the interpreter may wonder whether Article 191 TFEU has, in fact, served as a source of Article 37 beyond the literal reference to the ‘high level of environmental protection.’ All these questions will be addressed in section D below.

II. National Constitutional Law

The Explanatory Notes state that Article 37 of the Charter draws inspiration from ‘the provisions of *some* national constitutions’ (emphasis added), with no further indication as to the relevant countries. In fact, a brief overview of the constitutional texts³⁷ reveals a lack of ‘constitutional traditions common to the Member States’³⁸ with regard to environmental rights.

In the constitutions of some Member States, environmental protection is expressly recognised and protected, not only as a duty of governmental authorities, but also as a right (and duty) of the individual. For instance, the

³⁶ See also Article 191(3) TFEU, listing a number of criteria that the EU legislator ‘shall take into account’ when ‘preparing’ its policy on the environment (e.g. available scientific and technical data; environmental conditions in the various regions of the EU; potential benefits and costs of action or lack of action). Because of the comparatively weak language of this provision, however, such criteria may exert less influence, than the objectives and principles, in determining the content of the environmental protection requirements to be integrated pursuant to Article 11 TFEU. For a more detailed examination of Article 191 TFEU, see Marín Durán and Morgera, n 14 above, at 13-17.

³⁷ This section is based on the translated texts of the national constitutions provided by the European Union Agency for Fundamental Rights:

<http://infoportal.fra.europa.eu/InfoPortal/infobaseShowContent.do>.

³⁸ Case C-11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, para 4.

Spanish Constitution first declares that ‘everyone has the right to enjoy an environment suitable for the development of the person, as well as the duty to preserve it’.³⁹ It then directs public authorities to ‘watch over a rational use of all natural resources with a view to protecting and improving the quality of life and preserving and restoring the environment, by relying on an indispensable collective solidarity’.⁴⁰ Any infringement of these provisions is subject to criminal or administrative sanctions, as provided in national law, as well as to an obligation to repair the damage caused.⁴¹ A trend towards proclaiming a substantive right to environment is also found in the constitutional texts of Central European countries, which have acceded to the EU since 2004. For instance, the Slovakian Constitution first stipulates that ‘everyone has the right to an auspicious environment’,⁴² and is equally ‘obliged to protect and enhance the environment and the cultural heritage’.⁴³ A procedural right to environmental information is also guaranteed,⁴⁴ and the State is generally directed to ‘look after an economical use of natural resources, ecological balance, and effective environmental care’.⁴⁵

Short of adopting a right-based formulation, other national constitutions do nonetheless recognise environmental protection as a constitutional value and obligate the State to protect the environment. For instance, the German Constitution declares that ‘mindful also of its responsibility toward future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action ...’.⁴⁶ Similarly, the Greek Constitution affirms that ‘the protection of the natural and cultural environment constitutes a duty of the State’, and as a result, it is bound to adopt special preventive or repressive measures for the preservation of the environment’.⁴⁷ Using softer terms, the Dutch Constitution also requires the public authorities to concern themselves with ‘keeping the country habitable and to protect and improve the environment’.⁴⁸ These constitutional obligations on the State to protect the environment have been

³⁹ Spanish Constitution (as amended in 2011), Article 45(1).

⁴⁰ *Ibid.*, Article 45(2).

⁴¹ *Ibid.*, Article 45(3). See also, Article 23(4) of the Belgian Constitution (as amended in 2012) on the ‘right to enjoy the protection of a healthy environment’; and Article 20 of the Finnish Constitution (as amended in 2011) stating that ‘public authorities shall endeavour to guarantee for everyone the right to a healthy environment and for everyone the possibility to influence the decisions that concern their own living environment’; Article 66 of the Portuguese Constitution (as amended in 2005) stating that ‘Everyone shall possess the right to a healthy and ecologically balanced human living environment and the duty to defend it’, and setting out in detail the principal responsibilities of the State.

⁴² Constitution of the Slovak Republic (as amended in 2004), Article 44(1). See also, Article 53 of the Estonian Constitution (as amended in 2011); Article 18 of the Hungarian Constitution (as amended in 2010); Article 115 of the Latvian Constitution (as amended in 2009); Article 5 of the Polish Constitution (1997); Article 72 of the Slovenian Constitution (as amended in 2006).

⁴³ Constitution of the Slovak Republic (as amended in 2004), Article 44(2).

⁴⁴ *Ibid.*, Article 45 reads: ‘Everyone has the right to timely and complete information on the state of the environment and the causes and consequences of its condition’.

⁴⁵ *Ibid.*, 44(4).

⁴⁶ Basic Law of the Federal Republic of Germany (as amended in 2010), Article 20(a).

⁴⁷ Greek Constitution (as amended in 2008), Article 24(1), spelling out also in more detail the principal responsibilities of the States (Article 24(2)-(6)).

⁴⁸ Dutch Constitution (as amended in 2002), Article 21. See also Article 2(2) of the Swedish Constitution (as amended in 2012).

considered as equivalent, in fact, to the recognition of an individual right, since the concerned persons can ask public authorities to respect it.⁴⁹

Even though there is a number of EU Member States where environmental protection is not enshrined in formal constitutional texts, or that lack such a text altogether,⁵⁰ the environment may be protected in the national ‘constitutional framework’ via other laws⁵¹ and/or case-law.⁵² To be sure, the presence or absence in national constitutions of a right to environment, or/and of a public duty to protect it, may be determined by several legal and other factors, and the exact implications ultimately depend on how national courts interpret and use existing constitutional provisions. Yet, the overview just exposed appears to show that the constitutional provisions on environmental protection in most Member States are more ambitious, even if only in terms of asserting governmental responsibilities, than the letter of Article 37 of the Charter. This may be explained by the heightened concern of a minority of Member States about ‘avoiding the doubt’ that the solidarity rights under Title IV of the Charter created justiciable rights, such as a right to a healthy environment, where such a right was not already provided for under national laws.⁵³

D. Analysis

I. General Remarks

As it has already emerged from the review of national constitutions, Article 37 of the Charter is a clear manifestation of a lack of consensus among the Member States on a ‘substantive’ human right to the environment.⁵⁴ Such disagreement is reflected also at the international level. The EU and its Member

⁴⁹ A. Kiss, ‘Environmental and Consumer Protection’ in S. Peers and A. Ward (eds.), *The EU Charter of Fundamental Rights* (Hart Publishing, 2004), at 253.

⁵⁰ This is notably the case of the common law countries such as the UK. See, Boyle, ‘Human Rights or Environmental Rights: A Reassessment?’, n 3 above, at 482.

⁵¹ E.g. French Code on the Environment (as amended in 2012); Articles 7 and 35 of the Charter of Fundamental Rights and Freedoms of the Czech Republic (as amended in 1999). See further, A. Lucarelli, ‘Article 37 – Environmental Protection’ in W.B.T. Wolk (ed.), *Human Rights in Europe – Commentary on the Charter of Fundamental Rights of the European Union* (Carolina Academic Press, 2010), at 221-222.

⁵² The Italian Constitutional Court, for instance, interpreted the right to health that is protected by the Italian Constitution as including the right to a healthy environment: Italian Constitutional Court judgment n. 5172 of 6 October 1976. In addition, the Italian Constitution has been amended so as to include an explicit competence for the State, which is shared with the regions, to protect the environment and ecosystems: Article 117 of the Italian Constitution, as amended by Constitutional Law No 3/2001.

⁵³ Article 1(2) of the UK-Poland Protocol; see discussion by Anderson and Murphy, n 9 above, at 11-12.

⁵⁴ According to C. Coffey, ‘The EU Charter of Fundamental Rights: the Place of the Environment’ in K. Feus (ed.), *The EU Charter on Fundamental Rights: Text and Commentaries* (Federal Trust, 2000), at 132, ‘limited discussion of the possibility of explicitly incorporating environmental rights into the EU Treaties’ had occurred during the last Intergovernmental Conference leading to the adoption of the Amsterdam Treaty, on the basis of a proposal by the Commission to include a ‘right to a healthy environment, and the duty to ensure it’. According to J. Meyer, *Kommentar zur Charta der Grundrechte der Europäischen Union* (2nd edition, Helbing & Lichtenhahn, 2006), para 5, the proposal for an environmental provision in the Charter was made ‘relatively late’ in the Convention and the views of the members ‘diverged considerably.’

States are parties to the Aarhus Convention, which is the only legally-binding international agreement that makes reference to a substantive right to a healthy environment in an operative provision:

In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making and access to justice in environmental matters in accordance with the provisions of this Convention.⁵⁵

It follows from the above that the substantive right to a healthy environment is only recognized by the Aarhus Convention as a rationale for guaranteeing procedural environmental rights, which constitute the core of the Convention.⁵⁶ In fact, this interpretation was specifically spelt out in the UK Declaration to the Aarhus Convention:

The United Kingdom understands the references in article 1 ... to the 'right' of every person 'to live in an environment adequate to his or her health and well-being' to express an aspiration which motivated the negotiation of this Convention and which is shared fully by the United Kingdom. The legal rights which each Party undertakes to guarantee under article 1 are limited to the rights of access to information, public participation in decision-making and access to justice in environmental matters in accordance with the provisions of this Convention.⁵⁷

The controversial nature of a substantive right to a healthy environment at these various levels may explain its absence from the Charter. What remains less clear, however, is the choice of the drafters of the Charter not to incorporate the *procedural* environmental rights that are binding on the EU and its Member States as a matter of international law, or at least to those procedural environmental rights that have been long protected under the EU law, notably the right to access environmental information.⁵⁸ Nonetheless, pursuant to Article 53 of the Charter on level of protection,⁵⁹ the procedural environmental rights recognized under the Aarhus Convention may not be 'restricted or adversely affected' by the interpretation of the Charter.

Absent any proclamation of environmental rights in the Charter, the analysis in the next sections will first explore what the principle of environmental integration means and what its legal significance is in EU law, drawing on Article 11 TFEU as the main source of Article 37 of the Charter. The analysis will return to the question of the relevance of the Aarhus Convention in the discussion of remedies.

II. Specific Provisions

⁵⁵ Aarhus Convention, Article 1.

⁵⁶ Council of Europe, n 16 above, at 12.

⁵⁷ Declaration of the Kingdom of Great Britain and Northern Ireland, available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-13&chapter=27&lang=en.

⁵⁸ For an overview, see Jans and Vedder, n 11 above, at 368-377.

⁵⁹ M. Cartabia, 'Article 53 – Level of Protection' in G. Di Federico (ed.), *The EU Charter of Fundamental Rights – From Declaration to Binding Instrument* (Springer, 2011).

The rationale behind the principle of environmental integration first promulgated in Article 11 TFEU, and then in Article 37 of the Charter, lies in the realisation that progress in the environmental field by itself is not sufficient and may be countered by developments in other policy fields that disregard environmental protection requirements.⁶⁰ To put this in EU law terms, the very essence of the environmental integration principle resides in the fact that Treaty provisions other than the environmental legal bases⁶¹ may be used by the EU legislator to adopt measures that may (negatively) affect the environment. In broad terms, the environmental integration principle calls therefore for a ‘continuous greening’ of Union policies.⁶² Yet, what does environmental integration exactly mean in EU law? And does it have a different meaning under Articles 37 of the Charter and 11 TFEU?

As anticipated above, the language of these two provisions differs in a number of ways. First of all, the object of Article 37 of the Charter refers to a ‘high level of environmental protection’ and to the ‘improvement of the quality of the environment’, whereas that of Article 11 TFEU to ‘environmental protection requirements’ more broadly. Two interpretative questions arise: what do ‘high level of environmental protection’ and ‘improvement of the quality of the environment’ mean? And does the differently worded object of environmental integration under Article 11 TFEU have any bearing on the interpretation of Article 37 of the Charter?

As to the first question, none of the terms is defined in the EU Treaties. The expression ‘high level’ of environmental protection is considered ‘one of the most important substantive principles of European environmental policy.’⁶³ It is in fact reiterated as a principle of EU environmental policy in Article 191 TFEU, although it is made subject to consideration of the ‘diversity of situations in the various regions of the Union’.⁶⁴ While this expression cannot be understood as allowing the EU to adopt the lowest common denominator among the Member States’ standards of environmental protection,⁶⁵ the Court of Justice clarified that such a level of protection does not necessarily have to be the highest that is technically possible.⁶⁶ Overall, it can be concluded that the principle reflects a moving target –the idea of continuous improvement of the environmental protection standards across the Member States.⁶⁷ The expression ‘improvement of the quality of the environment’ is perhaps easier to interpret as implying that any measure leading to environmental degradation runs counter the spirit of Article 37 of the Charter.⁶⁸ However, none of these clarifications serves to establish what it is exactly that needs to ‘be integrated’ in Union policies pursuant to the environmental integration principle. It seems therefore

⁶⁰ J. Holder and M. Lee, *Environmental Protection: Law and Policy* (Cambridge University Press, 2007), at 164.

⁶¹ Namely, Articles 191(4) and 192 TFEU (below n 72).

⁶² Kramer, *EC Environmental Law*, n 14 above, at 20.

⁶³ Jans and Vedder, n 11 above, at 41.

⁶⁴ Art 191(2) TFEU; see section C.I. above.

⁶⁵ Kramer, *EC Environmental Law*, n 14 above, at 11-12.

⁶⁶ Case C-284/95 *Safety High-Tech v S. & T. Srl* (Safety High-Tech) [1998] ECR I-4301; see Jans and Vedder, n 11 above, at 42.

⁶⁷ Kramer, *EC Environmental Law*, n 14 above, at 12.

⁶⁸ Benoît-Rohmer, n 18 above, at 315.

useful and necessary to rely on the more precise wording of Article 11 TFEU, as one of the sources of Article 37, with a view to shedding light on the interpretation of the latter.

The substance of the ‘environmental protection requirements’ that are the object of the integration obligation in Article 11 TFEU is to be inferred from (albeit not explicitly limited to) the objectives and principles of EU environmental policy prescribed in Article 191 TFEU.⁶⁹ This indirectly serves to clarify also the role of Article 191 TFEU as a source of Article 37 of the Charter. Those objectives are framed in very broad terms.⁷⁰ Rather than seeking to (unduly) restrict the substantive scope of EU environmental competence, Article 191 TFEU leaves the EU legislator a wide margin of appreciation in deciding what action and measures, if any, are necessary to achieve the environmental objectives stipulated in the Treaty.⁷¹ The substantive content of EU environmental policy is therefore gradually defined by the EU political institutions⁷² as they adopt measures in pursuance of the broadly-framed Treaty objectives, whether unilaterally or by concluding international agreements. By the same token, the broad formulation of Article 191 TFEU supports a non-restrictive interpretation of the substantive scope of Article 11 TFEU: ultimately, it is a matter of political choice which specific environmental issues are to be integrated in the ‘Union policies and activities’.⁷³ In addition, the ‘environmental integration requirements’ under Article 11 TFEU include the environmental principles laid down in Article 191(2) TFEU, which go beyond a ‘high level of environmental protection’.⁷⁴

Besides the object of environmental integration, other textual differences may be noted between Article 37 of the Charter and 11 TFEU, notably in defining the scope of application. Whereas Article 37 succinctly refers to ‘policies of the Union’, Article 11 TFEU is more specific, and arguably comprehensive, in referring, first, both to the ‘definition’ and ‘implementation’ of Union policies, and second, not only to EU ‘policies’ but also its ‘activities.’ As to the latter, it could be inferred that the Charter takes a more restrictive approach and excludes Union’s activities that are not formally labelled as ‘policies’ of the EU in the Treaty.⁷⁵ This would be the case, for instance, of competition rules and

⁶⁹ Jans and Vedder, n 11 above, at 23.

⁷⁰ See section C.I. above.

⁷¹ See also Article 192 TFEU, granting the EU legislator a more general power to decide ‘what action is to be taken by the Union in order to achieve the objectives referred to in Article 191.’

⁷² That is, the Commission, the Council and the European Parliament, as the adoption of measures in this policy field is subject to the ‘ordinary legislative procedure, see Articles 192(1) and 294 TFEU. The conclusion of agreements with third countries and international organisations based on Article 191(4) TFEU is undertaken in accordance with the general procedure laid down in Article 218 TFEU, also involving the three institutions.

⁷³ Case C-157/96 *The Queen and Ministry of Agriculture, Fisheries and Food, Commissioners of Customs & Excise ex parte National Farmers Union et al* (National Farmers Union) [1998] ECR I-2211.

⁷⁴ See section C.I. above, and, for instance, Case T-13/99 *Pfizer Animal Health v Council* [2002] ECR II-3305, paras 114-115 in relation to the application of the precautionary principle to measures adopted to protect human health in the context of the common agricultural policy. Note that this is the case that is explicitly referred to in the Explanatory Notes to the Charter, at 35.

⁷⁵ Articles 3-6 TFEU.

the internal market freedoms. As to the former, Article 11 TFEU encompasses both the stages of ‘definition’ (which includes every step of the EU legislative processes, such as identification of policy objectives, development of proposals and adoption of legislation, as well as their review) and of ‘implementation’ (which includes the adoption of further implementing acts and of decisions outside the legislative process, and enforcement).⁷⁶

In addition, while both Article 37 of the Charter and Article 11 TFEU contain a link to ‘sustainable development’, they seem to differ in approach. Under Article 11 TFEU, environmental integration is conceived as a means for the realisation of sustainable development as a broader ‘objective’ (i.e. ‘with a view to promoting sustainable development’). Conversely, the language of Article 37 seems to subordinate environmental integration to sustainable development (i.e. ‘in accordance with’), which appears to be elevated as to the ‘main principle and bearer of an outright value’.⁷⁷ The concept of sustainable development is primarily an international construct, and was first conceived in the area of international environmental law.⁷⁸ However, sustainable development is not a monolithic, well-defined, notion in international law, and arguably even less so in EU law. Since the Treaty of Amsterdam, sustainable development has been part of the ‘raison d’être’ of the EU, given its inclusion among the foundational objectives of the Union’s internal and external action as a whole.⁷⁹ Just as for any other objectives, the EU Treaties do not offer a precise definition of sustainable development, and the Court has not engaged (thus far) with its interpretation. In EU legislation and policy documents, this concept has been interpreted flexibly and adapted to different contexts and new developments.⁸⁰

This lack of precise definition renders it difficult to identify the exact implications of the link between environmental integration and sustainable development in Articles 37 of the Charter and Article 11 TFEU. However, in declaring that environmental integration needs to be carried out in respect of the principle of sustainable development, Article 37 renders the need for a definition of such a principle more pressing.⁸¹ It should be noted that, the ‘inflationary use’ of sustainable development by the EU has been criticised as putting forward a separate concept from environmental protection, and for the lack of systematic attempts to assess whether self-proclaimed sustainable development measures comply with environmental protection requirements.⁸² This has led to concerns over a risk of ‘squeezing out’ environmental protection

⁷⁶ Dhondt, n 14 above, at 45-52.

⁷⁷ Lucarelli, n 51 above, at 233. See also de Sadeleer, n 16 above, at 48.

⁷⁸ What is traditionally considered the first definition of sustainable development is that proposed by the World Commission on Environment and Development, *Our Common Future* (Oxford University Press, 1987) (Brundtland Report), Ch 2, para 1: ‘development that meets the needs of the present without compromising the ability of future generations to meet their own needs’. See also, Rio Declaration, particularly Principles 1-3.

⁷⁹ Articles 2, 3(3) and (5), and 21(2)(f) TEU.

⁸⁰ See Marín Durán and Morgera, n 14 above, at 35-40.

⁸¹ Lucarelli, n 51 above, at 233.

⁸² L. Kramer, ‘Sustainable Development in the EC’ in H. Bugge and C. Voigt (eds.), *Sustainable Development in International and National Law* (Europa Law Publishing, 2008), at 391-393.

from sustainable development,⁸³ to the benefit of the other two pillars (social and economic development).⁸⁴

The textual and contextual analysis thus far seems to indicate a more restrictive enunciation of the principle of environmental integration under the Charter, when compared to the *acquis* of the EU Treaties. However, a systemic, rather than literal, interpretation of Article 37 in light of the broader and more precise wording of Article 11 TFEU seems preferable for ensuring a harmonious relationship between the Charter and the EU Treaties.⁸⁵

III. Legal Nature

Having established the meaning of environmental integration in EU law, we can now turn to the legal nature and strength of Article 37. Article 51 of the Charter distinguishes between ‘rights’ which the institutions and bodies of the Union, or its Member States when implementing EU law, ‘shall respect’, on the one hand, and ‘principles’ which they ‘shall observe’, on the other hand. This distinction, which is given more precise elaboration in Article 52 of the Charter, is of legal significance: while it seems clear that ‘rights’ are justiciable and can be invoked by individuals before the courts, the degree of justiciability and direct effect of ‘principles’ is not as straightforward.⁸⁶ Notwithstanding the importance of this distinction, the Charter does not offer a neat catalogue of ‘rights’ and ‘principles’,⁸⁷ nor is it always possible to conclusively assert from the wording of a particular Charter provision whether it contains a ‘right’ or a ‘principle’.⁸⁸ Nevertheless, there is little doubt that Article 37 of the Charter, which is the object of our analysis, belongs to the category of ‘principles.’⁸⁹ It articulates a principle of environmental integration, without any further legal content in the sense of a ‘fundamental right’.

Article 37 addresses the duties of public authorities in relation to environmental protection: that is, to ensure that a ‘high level of environmental protection’ and ‘the improvement of the quality of the environment’ is integrated into ‘the policies of the Union’, ‘in accordance with the principle of sustainable development’. Its wording differs strikingly from that of a classical right provision: the term ‘right’ itself is omitted, as are similar terms used in other

⁸³ See A. Ross-Robertson, ‘Is the Environment Getting Squeezed Out of Sustainable Development?’ (2003, Sum) *Public Law* 249.

⁸⁴ The Political Declaration of the World Summit on Sustainable Development, UN Doc A/CONF.199/20 Resolution 1, 4 September 2002 (WSSD Declaration), para 5 recognises: ‘three interdependent and mutually reinforcing pillars of sustainable development: economic development, social development and environmental protection’. See further, Marín Durán and Morgera, n 14 above, at 41.

⁸⁵ R. Schütze, ‘Three “Bills of Rights” for the European Union’ (2011) 30 *Yearbook of European Law* 131, at 146. This would be in line with the spirit of Article 52(2) of the Charter, albeit reference is only made to ‘rights’ in that context.

⁸⁶ *Ibid.*, at 98.

⁸⁷ The Explanatory Notes, at 35, only offer a non-exhaustive list of the principles recognised in the Charter, which notably includes Article 37.

⁸⁸ Explanatory Notes, at 35 noting that some provisions of the Charter may contain elements of both a ‘right’ and a ‘principle’.

⁸⁹ The Explanatory Notes on Article 37, at 33, indeed, make reference to the ‘principles set out in this Article’.

Charter provisions that do grant and protect individual rights (e.g. ‘everyone is entitled’,⁹⁰ ‘no one shall be subjected, held, required’).⁹¹ In addition, the provision ‘take[s] care not to specify any beneficiary’ of EU policies, thereby avoiding the creation of an ‘individual entitlement guaranteed to the victims of pollution.’⁹² Article 37 is thus a declaration of principle, which can be interpreted as being of a ‘policy-objective’ nature.⁹³ As such, it does not embody a right that could be enforced by individuals before the Court of Justice of the EU (ECJ), or the national courts of the Member States.

Against this background, to what extent does it impose a *legal obligation* upon the EU political institutions to integrate environmental concerns into Union policies? Is it intended to be a mere procedural rule requiring the EU legislator to consider the environmental dimension of other Union policies, or does it demand a substantive integration of environmental concerns? And how much discretion is left to the EU legislator in assessing and balancing environmental and other (at times) conflicting policy objectives?

At first sight, there seem to be three views on the legal significance of the environmental integration principle. The first, and weakest, interpretation would view the principle largely as a procedural tool, imposing a duty to simply ‘take into account’ environmental concerns in the development of other Union policies, while leaving the EU decision-makers with a broad discretion as to whether or not to adjust such policies in practice. The second, and stronger, interpretation of the principle would, instead, require the EU decision-makers to pursue environmental aims in a systematic manner alongside the specific sectoral objectives of other Union policies. In other words, it would demand substantive integration of environmental objectives into other Union policies, without however prescribing a clear precedence of environmental objectives over other EU policy objectives. Finally, under the third and strongest interpretation, environmental protection requirements would need to be applied at all times in priority to other (potentially conflicting) policy objectives.⁹⁴

In our view, the legal significance of the environmental integration principle needs to be first inferred on the basis of a close analysis of the wording of Article 37 Charter and Article 11 TFEU. Both of these provisions are clearly framed in mandatory and justiciable terms: ‘must be integrated’. Furthermore, in the EU Treaties, Article 11 TFEU stands out as the only integration clause that uses the term ‘must’, as opposed to ‘shall aim at’⁹⁵ or ‘shall take into account’⁹⁶ which are found in other mainstreaming clauses, and would appear

⁹⁰ E.g., Articles 34(2) and 46 of the Charter.

⁹¹ E.g., Articles 4, 5(1), 49(1), and 50 of the Charter.

⁹² de Sadeleer, n 16 above, at 44.

⁹³ Kiss, n 49 above, at 252; Lucarelli, n 51 above, at 230.

⁹⁴ See S. Kingston, ‘Integrating Environmental Protection and EU Competition Law: Why Competition Isn’t Special?’ (2010) 16(6) *European Law Journal* 780, at 788.

⁹⁵ Which is used in Article 8 TFEU (gender equality) and Article 10 TFEU (non-discrimination).

⁹⁶ Which is used in Article 9 TFEU (employment and social protection) and Article 12 TFEU (consumer protection). Art 13 TFEU on animal welfare uses also a weaker term (‘pay full regard’).

to limit more significantly the margin of institutional discretion.⁹⁷ Since its early case law on Article 11 TFEU, the Court seems to have interpreted the principle as legally binding.⁹⁸ As later noted by Advocate General Jacobs: ‘As its wording shows, [Article 11 TFEU] is not merely programmatic: it imposes legal obligations’.⁹⁹

In addition, the terms ‘be integrated’ in both provisions point to a substantive legal obligation, rather than a mere policy guideline or procedural rule that could be easily satisfied by the EU legislator through a superficial examination of the environmental implications of the measure envisaged (e.g. by simply taking note of the environment in a preambular recital).¹⁰⁰ Both provisions require that environmental objectives and principles are pursued and applied in all Union policies in a systemic manner. That being said, they do not prescribe a clear precedence for environmental protection to the detriment of other EU policy objectives. This is further corroborated by Article 7 TFEU requiring the Union to ensure consistency between *all* its policies and activities,¹⁰¹ as well as the lack of a hierarchy between the environmental integration principle and other mainstreaming clauses in EU primary law.¹⁰² Nonetheless, Article 11 TFEU and Article 37 of the Charter impose a general obligation on the EU institutions to carry out, at the very least, an integrated and balanced assessment of all the relevant environmental aspects when defining and implementing Union policies.¹⁰³

IV. Limitations and Derogations

While it is plain that the environmental integration principle is construed as a legal obligation under both Article 37 of the Charter and Article 11 TFEU, it is less clear the extent to which these provisions are judicially cognisable and

⁹⁷ Dhondt, n 14 above, at 101–03; E. Psychogiopoulou, *The Integration of Cultural Considerations in EU Law and Policies* (Doctoral thesis, European University Institute, 2006), at 68–73, offering a comparative analysis of the legal strength of the environmental integration requirement.

⁹⁸ Case C-62/88 *Greece v Council* [1990] ECR I-1527, para 20 (referring to former art 130r(2) SEA): ‘That provision, which reflects the principle whereby *all* Community measures *must satisfy* the requirements of environmental protection, implies that a Community measure cannot be part of Community action on environmental matters merely because it takes account of those requirements’ (emphasis added). The Court reiterated this interpretation in Case C-405/92 *Etablissements Armand Mondiet v Société Armement Islais* (Mondiet) [1993] ECR I-6133, para 27.

⁹⁹ Opinion of AG Jacobs in Case C-379-98 *PreussenElektra* [2001] ECR I-2099, para 231.

¹⁰⁰ M. Wasmeier, ‘The Integration of Environmental Protection as a General Rule for Interpreting Community Law’ (2001) 38(1) *Common Market Law Review* 159, at 164.

¹⁰¹ Art 7 TFEU reads: ‘The Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers’.

¹⁰² H. Vedder, ‘The Treaty of Lisbon and European Environmental Policy’ (2010) 22(2) *Journal of Environmental Law* 285, at 289. Before the Lisbon Treaty, environmental integration, together with gender equality (former Article 3(2) EC Treaty, now Article 8 TFEU) were the only mainstreaming requirements enjoying the status of general principle of EU law. With the Lisbon Treaty, this prominent position has been extended to employment and social and human health protection (Article 9 TFEU), non-discrimination (Article 10 TFEU); consumer protection (Article 12 TFEU); and animal welfare (Article 13 TFEU).

¹⁰³ Jans and Vedder, n 11 above, at 23.

enforceable. In this regard, Article 52(5) of the Charter states that provisions containing principles, such as Article 37, ‘shall be judicially cognisable only in the interpretation of [acts that implement them] and in the ruling on their legality’. Such a restriction is not placed on ‘rights’ and ‘freedoms’ referred elsewhere in Article 52 of the Charter. If read literally and in isolation, Article 52(5) of the Charter would seem to impose a significant limitation on the justiciability of Article 37: it can only be invoked before a court to challenge the legality of *an act implementing* (i.e. explicitly referring to) the principle of environmental integration, but presumably not to aid the interpretation of provisions in EU acts that do not *do not implement* (i.e. make no reference to) the principle.

However, the case law on Article 11 TFEU¹⁰⁴ does not make such a distinction and is less restrictive on the justiciability of the environmental integration principle. Article 11 TFEU has been relied upon by the Court not only to review the legality of EU acts specifically ‘implementing’ environmental integration,¹⁰⁵ but more generally. Given its status of general principle of EU law,¹⁰⁶ Article 11 TFEU is crucial to the interpretation of EU law as a whole, both primary and secondary, whether it explicitly or implicitly gives effect to the principle of environmental integration.¹⁰⁷ That is to say, the ECJ may only opt for an interpretation whose effects are positive or neutral on the environmental interests involved. An interpretation which does not favour the proper integration of environmental protection requirements in EU law or, ultimately, their reconciliation with other competing policy goals, is a priori inconsistent with Article 11 TFEU, and would need to be justified on the basis of Treaty exceptions or other overriding reasons.¹⁰⁸ A systemic interpretation of

¹⁰⁴ Note that the relevant case law relates to former Article 6 EC Treaty, and most of it has dealt with the role of that provision in the choice of the appropriate legal basis of EU acts, rather than with its implications for the normative content of such acts: Case C-62/88 *Greece v Council* (Chernobyl I) [1990] ECR I-1527; Case 155/91, *Commission v Council* (Waste Directive) [1993] ECR I-939; *Opinion 2/00 pursuant to Article 300(6) EC, Cartagena Protocol* ECR I-9713; Case C-336/00 *Republik Österreich v Martin Huber* [2002] ECR I-7699; Case C-94/03 *Commission v Council* (re Rotterdam Convention) [2006] ECR I-1; Case C-178/03 *Commission v European Parliament* [2006] ECR I-107. For an overview of this case law, see M. Cremona, ‘Coherence and EU External Environmental Policy’ in E. Morgera (ed.), *The External Environmental Policy of the European Union – EU and International Law Perspectives* (Cambridge University Press, 2012), at 45-51; and Dhondt, n 14 above, at 169-75.

¹⁰⁵ Most obvious in Case C-284/95 *Safety High-Tech v S. & T. Srl* (Safety High-Tech) [1998] ECR I-4301; and Case C-341/95 *Bettati v Safety Hi-Tech* (Bettati) [1998] ECR I-4355. See Dhondt, n 14 above, at 144-64 for an overview of case law applying former Article 6 EC Treaty (now Article 11 TFEU) and Article 174 EC (now Article 191 TFEU) in judicial review cases.

¹⁰⁶ See Kingston, n 94 above, at 787.

¹⁰⁷ Former Article 6 EC Treaty was used as a tool in interpreting Treaty provisions as well as secondary law in e.g.: Opinion of AG Jacobs in Case C-379/98 *Preussen-Elektra AG v Schleswig AG* [2001] ECR I-2099, paras 231-32; Joined Cases T-74/00 etc, *Artegoda and Others v Commission* [2002] ECR II-4945, paras 183-84; Opinion of AG Jacobs in Case C-126/01 *Ministère de l’Économie, des Finances et de l’Industrie v GEMO SA* [2003] ECR I-13769, paras 65-67; Opinion of AG Alber in Case C-444/00 *The Queen on the application of Mayer Parry Recycling Ltd v The Environment Agency and Secretary of State for Environment, Transport and the Regions* [2003] ECR I-6163, para 124.

¹⁰⁸ See Wasmeier, n 100 above, at 160-163 and 175-176; and more generally, F. Jacobs, ‘The Role of the European Court of Justice in the Protection of the Environment’ (2006) 18(2) *Journal of Environmental Law* 185.

Article 37 of the Charter, in light of Article 11 TFEU and its status as general principle of EU law, would therefore require a broader justiciability than that suggested by the letter of Article 52(5) of the Charter.

It would seem evident, as a consequence, that *any* piece of EU legislation that has a harmful effect on the environment breaches a clear Treaty obligation (Article 11 TFEU) and may be subject to annulment by the Court.¹⁰⁹ However, such a breach may be difficult to prove in practice. This is because of the broad discretion that is generally left to the EU political institutions in implementing and striking a balance between the various policy objectives and principles in the Treaties, with the exercise of judicial review usually being restricted to verifying that the competent institution did not clearly exceed the bounds of its discretion or misuse its powers.¹¹⁰ For instance, in disputes over the lawfulness of an ozone depletion regulation,¹¹¹ the ECJ confirmed the wide discretionary powers of the EU institutions with respect to the Treaty-based environmental objectives and principles, and justified it on the need for a margin of institutional appreciation in making complex assessments of and balancing between these objectives and principles.

It is therefore hard to imagine a situation where the environmental integration principle could, in practice, be the successful basis of a legal challenge of a EU measure which does not (or not sufficiently) integrate environmental protection requirements.¹¹² There appear to be no cases in which the Court has accepted that a particular piece of EU legislation is invalid just because it fails to take proper account of the environmental integration principle. Nor does there appear to be any cases where the principle has been relied on in order to challenge the validity of national legislation.¹¹³

A second limitation to the justiciability of the environmental integration principle emerges from the Explanatory Notes on Article 52(5) of the Charter, which provide that ‘principles’, unlike rights, in the Charter do not ‘give rise to direct claims for positive action by the Union’s institutions or Member States authorities’.¹¹⁴ In other words, Article 37 of the Charter cannot provide the basis for challenging a failure to act on the part of the EU institutions.¹¹⁵ A paradoxical result would ensue: that the EU legislator may be condemned for

¹⁰⁹ An action for annulment can be brought pursuant to art 263 TFEU: ‘The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects *vis-à-vis* third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects *vis-à-vis* third parties’.

¹¹⁰ See e.g. Cases C-331/88 *The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and others* [1990] ECR I-4023, para 8, Case *Mondiet*, n 98 above, para 32, C-180/96 *United Kingdom v Commission* [1998] ECR I-2265, para 60; and C-120/97 *Upjohn v The Licensing Authority* [1999] ECR I-223, para 34. On this point, see Psychogiopoulou, n 97 above, at 74–80.

¹¹¹ Case *Bettati*, n 105 above, especially paras 32–35; Case *Safety Hi-Tech*, n 105 above, especially paras 34–37; Opinion of AG Léger in *Bettati* case.

¹¹² For a similar view, see Cremona, n 104 above, at 39; and Dhondt, n 14 above, at 181.

¹¹³ D. Denman, ‘The Charter of Fundamental Rights’ (2010) 4 *European Human Rights Law Review* 349, at 354.

¹¹⁴ Explanatory Notes, at 35.

¹¹⁵ An action for failure to act can be brought pursuant to art 265 TFEU.

mis-implementing the principle of environmental integration, but not for failing to act upon it altogether. It has been noted, furthermore, that the Charter approach in this regard appears stricter than that of the ECJ in relation to the enforceability of EU environmental directives, whereby an individual can challenge a national agency before a national court for failing to take action under the directive.¹¹⁶

In essence, actual environmental integration into Union policies is largely a matter of legislative and executive discretion, with which the EU judiciary is unlikely to interfere. At most, the role of the Court in operationalizing the principle lies in its willingness to use it as tool to interpret EU law as a whole.

V. Remedies

Article 47 of the Charter declares the right to an effective remedy and to a fair trial in instances where ‘rights and freedoms guaranteed by the law of the Union are violated’. At first sight, the relevance of this provision to Article 37 of the Charter itself seems rather limited given that, as we have seen, it falls short of ‘guaranteeing’ any individual ‘right’ to environmental protection. At the same time, as we have also noted,¹¹⁷ Article 47 of the Charter must be given the ‘same meaning and scope’ than corresponding provisions in the ECHR, in this case: Articles 6(1) and 13.¹¹⁸ These two provisions have been interpreted by the ECtHR as guaranteeing access to justice and an effective remedy in environmental matters.¹¹⁹ In principle, therefore, EU and national courts should apply Article 47 of the Charter in light of this case law. This interpretation is further supported by the international obligations related to access to justice in environmental matters that bind the EU and its Member States under the Aarhus Convention.¹²⁰

In practice, however, access to justice and remedies in environmental matters is particularly deficient both at EU and Member State level. At Member State level, there is still a significant level of disparity in the national procedures on access to courts for environmental matters,¹²¹ partly due to lack of progress on the Commission’s legislative proposal for a Directive implementing the provisions in the Aarhus Convention on access to justice in environmental matters at the Member State level.¹²² Furthermore, levels of implementation at national level remain unsatisfactory with regards to specific provisions on

¹¹⁶ de Sadeleer, n 16 above, at 45, relying on Case C-237/07 *Janecek* [2008] ECR I-06221.

¹¹⁷ By virtue of Article 52(3) of the Charter; see section B above.

¹¹⁸ Explanatory Notes, at 34 and 29, respectively.

¹¹⁹ See summary of relevant ECtHR case law in Council of Europe, n 16 above, at 94-109; and de Sadeleer, n 16 above, at 63-64.

¹²⁰ Aarhus Convention Article 9.

¹²¹ N. de Sadeleer, G. Roller and M. Dross (eds), *Access to Justice in Environmental Matters and the Role of NGOs: Empirical Findings and Legal Appraisal* (Europa Law Publishing, 2005).

¹²² Commission, ‘Proposal for a Directive of the European Parliament and of the Council on Access to Justice in Environmental Matters’ COM(2003) 624final, Brussels 24 October 2003.

access to justice in existing EU environmental law.¹²³ The ECJ has, however, seized the opportunity to assert that national regulations on access to justice in environmental matters need to be interpreted so as to give full effect to the standards of the Aarhus Convention and avoid making the exercise of the right impossible, or excessively difficult, in practice.¹²⁴

At EU level, on the other hand, the ECJ has ‘obstinately clung to its rigid [Plaumann] doctrine’ on standing, and ‘practically barred’ environmental NGOs and individuals from bringing cases to EU courts to review the legality of EU environmental acts.¹²⁵ The practice has continued after the adoption of the Charter, and does not seem to be set to change notwithstanding the amendments introduced by the Lisbon Treaty.¹²⁶ As a result, the EU has already been censured by the Aarhus Convention Compliance Mechanism,¹²⁷ which has found that

...if the [relevant] jurisprudence of the EU Courts on access to justice, were to continue, *unless fully compensated for by adequate administrative review procedures*, the [EU] would fail to comply with Article 9(3) of the Aarhus Convention (emphasis added).¹²⁸

Against this background, it should be regrettably noted that the scope for administrative review of EU acts under the Regulation implementing the Aarhus Convention at the level of the EU institutions¹²⁹ is very narrow and applied in an ‘extremely restrictive’ manner.¹³⁰ It seems therefore hardly capable of ‘fully compensating’ for the lack of access to justice to EU courts.¹³¹ Indeed, the General Court has explicitly affirmed that this provision is ‘not compatible’ with the relevant provision of the Aarhus Convention.¹³²

¹²³ C. Poncelet, ‘Access to Justice in Environmental Matters – Does the European Union Comply with its Obligations?’ (2012) 24(2) *Journal of Environmental Law* 287, at 289-295; and Jans and Vedder, n 11 above, at 228-237.

¹²⁴ Case C-240/09 *Lesoochránárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* [2011] ECR I-1255, paras 46-51.

¹²⁵ Poncelet, n 123 above, at 298. See also L. Kramer, ‘Environmental Justice in the European Court of Justice’ in J. Ebbesson and P. Okowa (eds), *Environmental Law and Justice in Context* (Cambridge University Press, 2009).

¹²⁶ See new provision in Article 263(4) TFEU and pessimistic views on whether it can have any impact on access to justice for environmental matters at EU level by Jans and Vedder, n 11 above, at 250.

¹²⁷ A non-judicial, consultative body that reviews compliance with the Aarhus Convention by its parties, including on the basis of communications from the public: Aarhus Convention, Article 15.

¹²⁸ Communication to the Aarhus Convention Compliance Committee ACCC/C/2008/32, 2008; in particular, the Compliance Committee’s Findings and Recommendations (2011) UN Doc ECE/MP.PP/C.1/2011/4/Add.1, para 88.

¹²⁹ Regulation (EC) 1367/2006 on the application of the provisions of the Aarhus Convention to Community institutions and bodies [2006] OJ L264/13, Articles 10-11.

¹³⁰ J. Jans and G. Harryvan, ‘Internal Review of EU Environmental Matters: It’s True. Baron Van Munchausen Doesn’t Exist! Some Remarks on the Application of the So-called Aarhus Regulation’ (2010) 3(2) *Review of European and Administrative Law* 53.

¹³¹ Jans and Vedder, n 11 above, at 249.

¹³² Case T-338/08 *Stichting Natuur en Milieu and Pesticide Action Network Europe v European Commission*, judgment of 14 June 2012, not yet reported, paras 76-83.

This poor practice in relation to access to justice in environmental matters within the EU sheds light on yet another motive behind the unwillingness of the drafters of the Charter to proclaim any environmental rights. Without the shadow of a doubt, there is a host of compelling legal arguments for the ECJ to depart from its (excessively) restrictive approach to standing, notably a consistent interpretation of Articles 37 and 47 of the Charter with the Aarhus Convention, as well as with the relevant ECtHR case law.¹³³ Fears of opening the “floodgates” could be kept at bay, as suggested by Pallemmaerts, by creating a specialized court dealing with environmental issues through an act of the European Parliament and the Council.¹³⁴ But political rather than legal considerations seem to be preventing this development: the reluctance not only of (some) Member States, but also of the ‘EU institutions to be challenged by environmental organisations.’¹³⁵

E. Evaluation

Unlike some of the constitutions of the EU Member States, Article 37 of the Charter does not proclaim a substantive right to a healthy environment. In fact, Article 37 even fails to codify and elevate to a constitutional level procedural environmental rights that are already binding upon the EU and its Member States, both under international and EU secondary law. Rather than embodying a ‘limit’ on public authorities’ action in order to protect an individual right to environmental protection, or a positive obligation to act to fulfil such a right, Article 37 articulates a principle of environmental integration as an ‘aim’ for public authorities,¹³⁶ thereby simply providing a ‘yardstick against which to measure the relative success (or otherwise) of Union/national regulatory activities.’¹³⁷

Against this background, prominent scholars have argued that ‘an exceptional occasion has been missed’ to make progress in a field of fundamental importance for the life of European citizens, especially in the context of the rule of the free market¹³⁸ Indeed, one may question: what is the place of an environmental integration principle in a Charter of ‘Fundamental Rights’, and indeed its added value to Treaties *acquis*? Given its status of general principle of EU law, Article 11 TFEU already plays, as we have seen, a significant role as a source of interpretation of EU primary and secondary law, and at least potentially as a basis for reviewing the legality of EU acts. In this regard, Article 37 of the Charter adds nothing to Article 11 TFEU, but actually attempts to limit the substantive scope and degree of justiciability of the

¹³³ Jans and Vedder, n 11 above, at 244; Poncelet, n 123 above, at 302; M. Pallemmaerts, ‘Access to Justice at EU Level’ in M. Pallemmaerts (ed), *The Aarhus Convention at Ten: Interactions and Tensions between Conventional International Law and EU Environmental Law* (Europa Law Publishing, 2011), 273-312, at 311.

¹³⁴ By virtue of Article 257(1-3) TFEU: Pallemmaerts, n 133 above, at 372.

¹³⁵ Poncelet, n 123 above, at 307.

¹³⁶ Schütze, n 85 above, at 146.

¹³⁷ M. Dougan, ‘The Treaty of Lisbon 2007: Winning Minds, not Hearts’ (2008) 34 *Common Market Law Review* 617, at 663.

¹³⁸ Kiss, n 49 above, at 268.

environmental integration principle.¹³⁹ Does this mean, in essence, that Article 37 is only of a symbolic value,¹⁴⁰ a mere reminder to readers of a possible environmental dimension of the Charter? Or, as cautiously advanced by AG AG Léger, a sign that environmental protection will be accorded ‘increasing importance’ in the future?¹⁴¹

Taking an optimist standpoint, one could foresee an added-value in Article 37 and its inclusion in a Charter of ‘Fundamental Rights’ as a supplementary legal argument, and ‘persuasive authority’,¹⁴² for ‘greening’ the practice of EU institutions –both political and judicial– vis-à-vis procedural environmental rights guaranteed under the Aarhus Convention in the future. This is particularly pressing for access to justice in environmental matters at EU level which, as we have seen, is not only below ECHR standards,¹⁴³ but has also been censured by Aarhus Convention Compliance Committee. Ultimately, if the very rationale for ‘constitutionalising’ the Charter was ‘the need for robust and accessible judicial protection for individuals against the ever-increasing powers of the Union and of the Member States when acting within the scope of Union law’,¹⁴⁴ then improved individual access to justice in environmental matters is not only urgent from the viewpoint of intensive and ambitious EU environmental law internally, but also increasingly desirable in relation to its external environmental action.¹⁴⁵ Possibly the EU’s ambition to lead in the global fight against climate change¹⁴⁶ may bring it to consider the role of environmental rights more broadly within its legal system.¹⁴⁷

From a more pragmatic perspective, judicial references to Article 37 of the Charter have been thus far limited in both quantitative and qualitative terms,¹⁴⁸ with the notable exception of AG Colomer’s bold statement:

Environmental protection currently occupies a prominent position among Community policies. Furthermore, the Member States also have a crucial responsibility in that area. *Community citizens are entitled to demand fulfillment of that responsibility under Article 37 of the Charter of Fundamental Rights of*

¹³⁹ Along similar lines, see Hectors, n 18 above, at 167-8, considering Article 37 as a ‘politically-driven weakened version of what European legal practice is now in general’.

¹⁴⁰ Lombardo, n 18 above, at 221.

¹⁴¹ Opinion of AG Léger in Case C-277/02 *EU-Wood-Trading GmbH* [2004] ECR I-11957, para 9.

¹⁴² Article 37 was explicitly referred as such by the ECtHR in *Hatton and Others v UK* (2002) 34 EHRR 1; see comments in Anderson and Murphy, above n 9, at 16.

¹⁴³ Schütze, n 85 above, at 155.

¹⁴⁴ Anderson and Murphy, n 9 above, at 20.

¹⁴⁵ D. Augenstein, ‘The Human Rights Dimension of Environmental Protection in EU External Relations After Lisbon’, in E. Morgera (ed), n 104 above, at 263-286.

¹⁴⁶ E.g., S. Oberthür and M. Pallemmaerts, *The New Climate Policies of the European Union: Internal Legislation and Climate Diplomacy* (VUB Press, 2010); and K. Kulovesi, ‘Climate Change in EU External Relations: Please Follow my Example (or I Might Force You to)’ in E. Morgera (ed), n 104 above.

¹⁴⁷ Possibly at the instigation of the European Parliament: C. Cournil et al, *Human Rights and Climate Change: EU Policy Options* (European Parliament, August 2012), <http://www.europarl.europa.eu/committees/fr/studiesdownload.html?languageDocument=EN&file=76255>.

¹⁴⁸ To the authors’ best knowledge on the basis of research conducted on the website of the ECJ and EU Fundamental Rights Agency. Note, however, that there are increasing references to Article 37 in the preamble of recent EU environmental acts: Jans and Vedder, n 11 above, at 25.

the European Union, which guarantees a high level of environmental protection and the improvement of the quality of the environment. Accordingly, the main elements of any measure which strays from the general criteria aimed at protecting the environment must be duly specified, since that is an embodiment of the rational exercise of power, as well as being a tool which, if necessary, enables the measure to be reviewed subsequently.¹⁴⁹ (emphasis added).

However, this seems as of yet an isolated instance, which does not suggest that Article 37 is set to acquire increasing importance in the near future.

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¹⁴⁹ Opinion of AG Colomer in Case C-87/02 *Commission v Italy* [2004] ECR I-05975, para 36